No. 4055

United States

Circuit Court of Appeals

For the Ninth Circuit.

GARCIA & MAGGINI COMPANY, a Corporation,
Plaintiff in Error,

vs.

WASHINGTON DEHYDRATED FOOD COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

FRED L. DREHER, Esq., Bank of Italy Bldg., San Francisco, Calif.,
Attorney for Plaintiff in Error.

Messrs. HAVEN, ATHEARN, CHANDLER & FARMER, Balboa Bldg., San Francisco, Calif.,
Attorneys for Defendant in Error.

In the Southern Division of the District Court of the United States, for the Northern District of California, Second Division.

No. 16,703.

WASHINGTON DEHYDRATED FOOD CO., a Corporation,
Plaintiff,

vs.

GARCIA & MAGGINI CO., a Corporation,
Defendant.

Complaint on Contract.

Plaintiff complains of defendant and for cause of action alleges:

I.

Plaintiff is a corporation duly organized and existing as such under the laws of the State of Washington and is a citizen of said State of Washington.

II.

Defendant is a corporation duly organized and existing as such under the laws of the State of California and is a citizen of said State of California,

and a resident of the Southern Division of the Northern District of said State.

III.

Plaintiff and defendant on or about June 13, 1919, at the City and County of San Francisco, State of California, entered into a contract in writing wherein and whereby plaintiff agreed to sell to defendant and defendant agreed to buy from plaintiff sixty thousand (60,000) pounds extra choice evaporated apples at an agreed price of Eleven Thousand Four Hundred ($11,400.00) Dollars. Said contract provided that delivery of said evaporated apples was to be made by plaintiff to defendant in January, 1920, f. o. b. cars at Wenatchee in the State of Washington, for shipment by route or routes and to destination to be designated by defendant. [1*]

IV.

Plaintiff on or about January 17, 1920, advised defendant that plaintiff was ready, willing and able to deliver said evaporated apples in accordance with the terms of said contract, and demanded that defendant forthwith furnish plaintiff with shipping instructions for the shipment of said evaporated apples, as provided in said contract.

Defendant failed and refused to furnish plaintiff with said or any shipping instructions, and on or about January 23, 1920, notified plaintiff that it, the said defendant, would not perform the terms of the aforesaid contract, and has at all times herein mentioned failed and refused to perform the same.

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*Page-number appearing at foot of page of original certified Transcript of Record.

V.

Plaintiff, or or about February 13, 1920, notified defendant that unless defendant forthwith performed said contract, plaintiff would resell said evaporated apples and would hold defendant for any loss suffered thereby.

VI.

Plaintiff, within a reasonable time after the aforesaid notice, sold said evaporated apples for the sum of Seven Thousand Fifty ($7,050.00) Dollars.

Subsequent to the demand by plaintiff of defendant for the performance of the terms of said contract, and prior to the sale of said evaporated apples by it, plaintiff paid out for storage and insurance on said evaporated apples the sum of Four Hundred Twenty-six and 44/100 ($426.44) Dollars, which expense was necessarily incurred by plaintiff in caring for said apples during said period.

By reason of the refusal of defendant to perform the terms of said contract, plaintiff was deprived of the use of the money which was payable to it under the terms of said contract, for a period of six (6) months and eighteen (18) days, and plaintiff was required to pay interest thereon in a total sum of Five Hundred One and 60/100 ($501.60) Dollars.

Plaintiff further incurred necessary expenses in making said sale in the approximate sum of Fifteen Hundred ($1500.00) Dollars. [2]

VII.

By reason of the foregoing facts plaintiff has been

damaged in the sum of Six Thousand Seven Hundred Seventy-seven and 4/100 ($6,777.04) Dollars.

And for a further and second cause of action, plaintiff alleges:

I.

Plaintiff is a corporation duly organized and existing as such under the laws of the State of Washington and is a citizen of said State of Washington.

II.

Defendant is a corporation duly organized and existing as such under the laws of the State of California and is a citizen of said State of California, and a resident of the Southern Division of the Northern District of said State.

III.

Plaintiff and defendant on or about June 13, 1919, at the City and County of San Francisco, State of California, entered into a contract in writing wherein and whereby plaintiff agreed to sell to defendant and defendant agreed to buy from plaintiff sixty thousand (60,000) pounds extra choice evaporated apples at an agreed price of Eleven Thousand Four Hundred ($11,400.00) Dollars. Said contract provided that delivery of said evaporated apples was to be made by plaintiff to defendant in January, 1920, f. o. b. cars at Wenatchee in the State of Washington, for shipment by route or routes and to destination to be designated by defendant.

IV.

Plaintiff on or about January 17, 1920, advised de-

fendant that plaintiff was ready, willing and able to deliver said evaporated apples in accordance with the terms of said contract, and demanded that defendant forthwith furnish plaintiff with shipping instructions for the shipment of said evaporated apples, as provided in said contract.

Defendant failed and refused to furnish plaintiff with said or any shipping instructions, and on or about January 23, 1920, notified plaintiff that it, the said defendant, would not perform [3] the terms of the aforesaid contract, and has at all times herein mentioned failed and refused to perform the same.

V.

The value of the aforesaid quantity and quality of evaporated apples to plaintiff at Wenatchee, in the State of Washington, on or about January 17, 1920, was the sum of Twenty-four Hundred ($2400.00) Dollars.

VI.

By reason of the foregoing facts plaintiff has been damaged in the sum of Nine Thousand ($9,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against defendant in the sum of Nine Thousand ($9,000.00) Dollars, together with interest thereon at the rate of seven (7%) per annum from January 17, 1920, and for its costs incurred herein.

HAVEN, ATHEARN, CHANDLER & FARMER,

Attorneys for Plaintiff.

State of Washington,
County of Yakima,—ss.

Ira D. Cardiff, being first duly sworn, deposes and says:

That he is the general manager of the Washington Dehydrated Food Co., a corporation, plaintiff in the above-entitled action, and as such makes this affidavit.

That he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated upon information and belief and as to such matters he believes it to be true.

IRA D. CARDIFF.

Subscribed to and sworn to before me this 7th day of March, 1922.

[Seal] C. ALBERT PALMER,
Notary Public in and for the State of Washington, County of Yakima.

[Endorsed]: Filed Mar. 13, 1922, W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [4]

(Title of Court and Cause.)

(Demurrer of Defendant.)

Comes now the defendant above named and demurring to the complaint of plaintiff on file herein for grounds of demurrer specifies:

I.

That complaint does not state facts sufficient to constitute a cause of action against defendant.

II.

That the first cause of action as set forth in said complaint does not state facts sufficient to constitute a cause of action against said defendant.

III.

That the second cause of action as set forth in said complaint does not state facts sufficient to constitute a cause of action against said defendant.

IV.

That the first cause of action as set forth in said complaint is uncertain in the following particulars, viz: that it cannot be determined nor ascertained therefrom—

(a) On what date plaintiff sold the evaporated apples as alleged in paragraph VI thereof.

(b) Whether plaintiff sold said apples at public or private sale.

(c) What the market value of said evaporated apples was on January 23d, 1920, or at the time the same are alleged to have been sold.

V.

That said first cause of action as set forth in said complaint is ambiguous in the same particulars wherein it is herein specified to be uncertain.

VI.

That said first cause of action as set forth in [5] said complaint is unintelligible in the same particulars wherein it is herein specified to be uncertain.

VII.

That said second cause of action as set forth in said complaint is uncertain in the following particulars, viz., that it cannot be determined nor ascertained therefrom—

(a) How or in what manner plaintiff has arrived at the value of said apples as alleged in paragraph V thereof.

(b) What price plaintiff could have obtained for said evaporated apples in the market nearest to the place that they should have been accepted by defendant, and at such time after the alleged breach of the contract as would have sufficed with reasonable diligence for the plaintiff to effect a resale.

VIII.

That the said second cause of action as set forth in said complaint is ambiguous in the same particulars wherein it is herein specified to be uncertain.

IX.

That said second cause of action as set forth in said complaint is unintelligible in the same particulars wherein it is herein specified to be uncertain.

WHEREFORE, defendant prays to be hence dismissed with its costs.

FRED L. DREHER,
Attorney for Defendant.

I hereby certify that the foregoing demurrer is in the opinion of the undersigned counsel for the defendant well taken in point of law and that the same is not filed for the purpose of delay.

Dated: March 30th, 1922.

FRED L. DREHER,
Attorney for Defendant. [6]

Due service of a copy of the within demurrer of defendant is hereby admitted this 30th day of March, 1922.

HAVEN, ATHEARN, CHANDLER & FARMER,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 30, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

(Title of Court and Cause.)

Notice of Motion to Strike Out.

To the Plaintiff Above Named and to Messrs. Haven, Athearn, Chandler & Farmer, Attorneys for Plaintiff.

PLEASE TAKE NOTICE that on the 10th day of April, 1922, at the hour of ten o'clock A. M. of said day, and at the courtroom of the above-entitled court, Second Division thereof, located at Seventh and Mission Streets, in the city and county of San Francisco, State of California, the defendant above named will move the above-entitled court to strike out from the complaint of plaintiff on file herein the following portions thereof, to wit:

All of paragraphs V and VI of the first cause of action as set forth in said complaint.

Said motion will be made on the ground that said

portions of said complaint are irrelevant and redundant, and will be based on all of the papers and pleadings on file herein, and on this notice of motion.

Dated: March 30th, 1922.

FRED L. DREHER,
Attorney for Defendant.

Due service of a copy of the within notice of motion to strike out is hereby admitted this 30th day of March, 1922.

HAVEN, ATHEARN, CHANDLER & FARMER,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 30, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

At a stated term, to wit, the March term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 8th day of May, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,703.

WASHINGTON DEHYDRATED FOOD CO.

vs.

GARCIA & MAGGINI CO.

Minutes of Court—May 8, 1922—Order That Demurrer be Withdrawn, etc.

By consent, ordered that the demurrer to complaint and motion to strike out parts be withdrawn with ten days to answer. [9]

(Title of Court and Cause.)

(Answer of Defendant.)

Comes now the defendant above named and answering plaintiff's complaint on file herein, admits, denies and alleges as follows:

I.

Answering the first cause of action set forth in said complaint, denies that plaintiff and defendant on or about June 13th, 1919, or at the City and County of San Francisco, State of California, or at any other time or place, entered into a contract in writing wherein or whereby plaintiff agreed to sell to defendant or defendant agreed to buy from plaintiff sixty thousand pounds or any other quantity of extra choice evaporated apples or at an agreed price of Eleven Thousand Four Hundred (11,400) Dollars or at an agreed price of any other sum or sums or any other apples or at all, except as hereinafter alleged with respect to that certain contract, a copy of which is hereto attached and marked Exhibit 1; denies that said contract provided that delivery of said evaporated apples or any part thereof was to be made by plaintiff to defendant in

January, 1920, or at any other time f. o. b. cars at Wenatchee, in the State of Washington or for shipment by route or routes or to destination to be designated by defendant, and in this behalf defendant alleges that on or about the 13th day of June, 1919, plaintiff and defendant entered into a contract in writing, a copy of which said contract is hereto attached, made a part hereof and marked Exhibit 1, and that said last mentioned contract was and is the only contract entered into by plaintiff and defendant on or about said date wherein and whereby defendant agreed to purchase any evaporated apples from plaintiff.

II.

Denies that on or about January 17th, 1920, or at any other time plaintiff advised defendant that plaintiff was [10] ready or willing or able to deliver said evaporated apples or any apples in accordance with the terms of said contract, a copy of which is hereunto attached, marked Exhibit 1, and denies that plaintiff demanded that defendant furnish plaintiff with shipping instructions for the shipment of the evaporated apples or any apples provided for in said last mentioned contract.

III.

Denies that plaintiff on or about February 13th, 1920, or at any other time notified defendant that unless defendant forthwith perform said last mentioned contract that plaintiff would resell the evaporated apples provided for in said last mentioned contract or any part of said apples or that

plaintiff would hold defendant for any loss suffered thereby.

IV.

Alleges that defendant has not sufficient information or belief to enable it to answer the allegations contained in paragraph VI of the first count or cause of action contained in said complaint and placing its denial on that ground denies that plaintiff within a reasonable time after the 13th day of February, 1920, or at any other time sold said evaporated apples for the sum of Seven Thousand and Fifty (7,050) Dollars, or for any other sum less than the sum of Eleven Thousand Four Hundred Dollars;

Denies that subsequent to the demand by plaintiff of defendant for the performance of the terms of said contract or prior to the sale of said evaporated apples by it or at any other time plaintiff paid out for storage or insurance on said evaporated apples or any apples the sum of Four Hundred Twenty Six, and 44/100 (426.44) Dollars, or any other sum and denies that said expense or any expense was necessarily incurred or incurred by plaintiff in caring for said apples during said period or for any other period.

Denies that by reason of the refusal of defendant to perform any of the terms of said contract plaintiff was deprived of the use of the money which was payable to it under the terms of said contract, or any money, or for a period of six months or eighteen days or for any other period, or that plaintiff was [11] required to pay interest thereon in

the sum of Five Hundred One and 60/100 (501.60) Dollars or any other sum or at all.

Denies that plaintiff further incurred necessary expenses or any expenses in making said sale in the approximate sum of Fifteen Hundred (1500) Dollars or any sum or at all.

V.

Denies that plaintiff has been damaged in the sum of six thousand seven hundred seventy seven and 04/100 (6777.04) dollars, or any other sum or at all.

And answering the second count or cause of action set forth in said complaint, said defendant admits, denies and alleges as follows:

I.

Denies that plaintiff and defendant on or about June 13th, 1919, or at the city and county of San Francisco, State of California, or at any other time or place entered into a contract in writing wherein or whereby plaintiff agreed to sell to defendant or defendant agreed to buy from plaintiff sixty thousand pounds or any other quantity of extra choice evaporated apples or at an agreed price of eleven thousand four hundred (11,400) dollars or at an agreed price of any other sum or sums or any other apples or at all, except as hereinafter alleged with respect to that certain contract, a copy of which is hereto attached and marked Exhibit 1; denies that said contract provided that delivery of said evaporated apples or any part thereof was to be made by plaintiff to defendant in January, 1920 or at any other time f. o. b. cars at Wenatchee, in the State of Washington or for shipment by route or routes

or to destination to be designated by defendant and in this behalf defendant alleges that on or about the 13th day of June, 1919, plaintiff and defendant entered into a contract in writing, a copy of which said contract is hereto attached, made a part hereof, and marked Exhibit 1 and that said last mentioned contract was and is the only contract entered into by plaintiff and defendant on or about said date wherein and whereby defendant agreed to [12] purchase any evaporated apples from plaintiff.

II.

Denies that on or about January 17th, 1920, or at any other time plaintiff advised defendant that plaintiff was ready or willing or able to deliver said evaporated apples or any apples in accordance with the terms of said contract, a copy of which is hereunto attached marked Exhibit 1, and denies that plaintiff demanded that defendant furnish plaintiff with shipping instructions for the shipment of the evaporated apples or any apples provided for in said last mentioned contract.

III.

Defendant alleges that it has not sufficient information or belief to enable it to answer the allegations contained in paragraph V of the second cause of action contained in said complaint and placing its denial on that ground denies that the value of the said quantity or quality of evaporated apples to plaintiff at Wenatchee, in the State of Washington, or at any other place on or about January 17th, 1920, or within any reasonable time thereafter was

the sum of Twenty-four Hundred (2400) Dollars, or any sum less than the sum of Eleven Thousand Four Hundred (11,400) Dollars, and in this behalf defendant is informed and believes and therefore upon such information and belief alleges that the value of the quantity and quality of evaporated apples mentioned in said complaint to the plaintiff at the point of shipment provided for in said contract on or about January 17th, 1920, and for a reasonable time thereafter was not less than the sum of eleven thousand four hundred (11,400) dollars.

V.

Denies that plaintiff has been damaged in the sum of nine thousand (9,000) dollars or any sum or at all.

And further answering plaintiff's complaint on file herein, said defendant alleges that on or about the 13th day of June, 1919, plaintiff and defendant entered into a contract in writing, a copy of which said contract is hereto attached marked [13] Exhibit 1 and made a part hereof, and that said last mentioned contract was and is the only contract entered into by plaintiff and defendant on or about said 13th day of June, 1919, wherein or whereby defendant agreed to purchase any evaporated apples from plaintiff; that on or about the 23d da of January, 1920, said contract was rescinded and cancelled by said defendant and that plaintiff on or about said last mentioned date accepted and consented to such rescission and cancellation and thereupon all obligations on the part of the defendant therein contained were extinguished.

WHEREFORE defendant prays that plaintiff take nothing by its complaint on file herein and that defendant have judgment for its costs incurred.

FRED L. DREHER,
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

Albert Asher, being first duly sworn, deposes and says: That he is an officer, to wit, the president of Garcia & Maggini Co. the defendant above-named, and makes this affidavit for and on behalf of said defendant corporation; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters alleged therein on information and belief and as to those he believes the same to be true.

ALBERT ASHER.

Subscribed and sworn to before me this 31st day of May, 1922.

[Seal] HARRY L. HORN,
Notary Public in and for the City and County of San Francisco, State of California. [14]

BROKER'S COPY

RAIL SHIPMENT

GARCIA & MAGGINI CO.

SAN FRANCISCO, CALIFORNIA

No.

CALIFORNIA DRIED FRUIT CONTRACT

Adopted April 23, 1919, by

NATIONAL WHOLESALE GROCERS' ASSOCIATION OF THE UNITED STATES and
DRIED FRUIT ASSOCIATION OF CALIFORNIA

June 13 1919.

Garcia & Maggini Co. OF San Francisco, Cal.

Hereinafter called Buyer, has bought, and Washington Dehydrated Food Co., Yakima, Wash. hereinafter called Seller, has this day sold the following quantities of California Dried Fruits, as per varieties, style of package and prices, named below, and on terms and conditions stated on reverse side of this contract.

ROUTING Later

DESTINATION Later

CONSIGNED TO Garcia & Maggini Co.

TIME OF SHIPMENT December or January (Seller's Option)

NO. AND KIND OF PACKAGE	NET WEIGHT IN POUNDS	BRAND	GRADE	VARIETIES	BULK BASIS	PRICE PER POUND	PRICE PER PACKAGE	✓
1 Car	60,000# net		Choice	Evaporated Apples	18-1/2¢			

With provision that seller may be privileged to substitute grades providing cannot fill order with grade ordered at Extra Choice 19¢

Fancy 19-3/4¢

All on basis packed in 50# boxes, 25# boxes 1/2¢ advance. Seller's grading or inspection by buyer at shipping point.

CALIFORNIA DRIED FRUIT CONTRACT

(Rail Shipment)

ADOPTED APRIL 23, 1918, BY

NATIONAL WHOLESALE GROCERS' ASSOCIATION OF THE UNITED STATES AND DRIED FRUIT ASSOCIATION OF CALIFORNIA

(As per specifications on reverse side)

TERMS: F. O. B. Pacific Coast Rail Shipping Point. Cash less two per cent (2%) if draft is paid within ten (10) days from date thereof, otherwise net cash thirty (30) days after date of draft, unless shipment arrives prior thereto in which case payment shall be made within three (3) full business days after arrival. Payment to be made against draft with documents attached in New York, Chicago or San Francisco Exchange, or equivalent.

EXAMINATION AND APPROVAL: Buyer shall have no right of claim nor be entitled to arbitration and contract shall be considered fully complied with on Seller's part unless claim is made or arbitration demanded within three (3) full business days after arrival of goods or if examination is impossible within that time by reason of goods not being accessible for examination, then within said period after examination becomes possible.

ROUTING: Seller shall, where possible, recognize routing named by Buyer, but Seller has option of selecting the initial line. Should Buyer divert goods while in transit without Seller's consent, Seller shall be relieved of all responsibility for quality and/or condition. Change in routing from rail to water shipment (if requested) is subject to Seller's confirmation, Buyer assuming freight to and charges at Dock, State Toll, and all unloading and/or loading charges at Port. On such water shipments and on shipments to be made via Gulf Lines, the provisions of this contract shall be modified and superseded by the terms and conditions contained in the form of contract of the Seller, effective June 2nd, 1919, known as Dried Fruit Association of California Water Shipment Contract; but if at any time within ten (10) days prior to final shipping date it be found impossible by reason of blockade or embargo to ship via Gulf Lines, Seller shall notify Buyer and in the absence of immediate instructions to ship via another route then open or to store goods for Buyer's account, the Seller shall be privileged to ship by any rail route at current freight rates. Should it be found impossible by reason of aforesaid causes to ship all rail, Seller shall then be privileged to store and insure at Buyer's expense. If goods are shipped all rail the terms and conditions of this contract shall apply; if stored Buyer agrees to pay Seller's draft at two (2) days' sight, less two per cent (2%) discount, to which shall be attached (in addition to the weight and quality certificates provided by said Water Shipment Contract) Warehouse Receipt and Fire Insurance Certificate.

RESPONSIBILITY: Notwithstanding sh...ped to Seller's order, goods are at risk of Buyer from and after delivery to Carrier, and Buyer hereby assumes responsibility as to shortage, loss, delay or damage in transit upon issuance by Carrier of clean Bill of Lading or shipping receipt. Goods are at Buyer's risk when delivered at his request to a third party.

QUALITY: Good merchantable, unless otherwise specified, and equal to or better than the average of the grade for the section where grown and of the current season at time of shipment. If sold on sample, to be equal to or better than sample.

SEPARABLE LOTS: This contract shall be deemed separable as to all goods sold hereunder and Buyer may not refuse to receive any lot or portion of the goods shipped hereunder for failure of any other lot or portion to comply with the contract, UNLESS THE RIGHT TO SO REFUSE IS EXPRESSLY PROVIDED FOR ON THE REVERSE SIDE HEREOF.

WEIGHTS: No allowance shall be made except for shortage of average weights in excess of one per cent (1%) to be ascertained and certified by public weigher upon a weighing for gross, of not less than fifty per cent (50%) a... for ... of not less than two per cent (2%) of the shipment. Carton Goods: No. 16 to average fifteen (15) ounces net; and No. ... ounces net when packed. All other package goods to conform to established trade custom.

SPECIFICATIONS: If no assortment is agreed upon at time of sale it is expressly understood that sale is made subject to Seller's approval of a reasonable assortment specified by Buyer, based on season's crop; unless such assortment is reasonable and is specified by Buyer at least thirty (30) days prior to the last day of shipping period, Buyer agrees to accept Seller's assortment according to Seller's grading, and unless specifications for packing are furnished prior to said thirty (30) days Seller may ship goods in any standard size packages.

LIABILITY: If the operations of the Seller shall be prevented or interfered with by exercise of Governmental authority, or by force majeure, embargo, war, civil uprising, fire, strikes, or similar casualty beyond reasonable control of Seller, the Seller shall be excused from performance hereof to the extent that performance of this contract (taking into account all outstanding contracts of the Seller for the delivery of the same class of goods) shall be so prevented or interfered with. **Extension of Time:** Should Seller be obstructed or delayed in the fulfillment of any portion of this contract by any of the aforementioned causes, or the failure of transportation facilities, then the time herein fixed for its fulfillment shall be extended for a period equivalent to the time lost for any or all of the reasons aforesaid, provided notice of such obstruction or delay is given before expiration of period herein fixed for shipment, and provided further that any premium for stipulated shipment be waived by Seller. It is agreed that if by reason of any of the aforementioned causes shipment of any of said goods is not made within sixty (60) days after the time herein specified therefor, this contract shall terminate with respect to any goods not then shipped. **Future Sales:** In the event of destruction of or serious damage to crops after April 15th, of the year in which this sale is made and subsequent to the date of this contract, Seller may reduce quantity twenty-five per cent (25%) without penalty. If less than seventy-five per cent (75%) is tendered, Seller shall pay as damages fifteen per cent (15%) of net contract price of shortage below seventy-five per cent (75%) unless the California State Commission of Horticulture shall decide the Seller is justified in delivering a smaller percentage because of crop damage. Unless a particular district is specified, the crop of the entire State of the variety of fruit named is to be taken into consideration in determining what is a fair delivery.

POOL CARS: Distribution charges at destination at expense of Buyer. Where goods are sold in less than car'oad quantities to be included in car for various Buyers to be completed later, and said car is not completed within ten (10) days of expiration of contract time for shipment, Seller may ship goods in car to some point nearby to destination and the Buyer shall then pay local freight from such point to final destination.

ARBITRATION: Except for the determination to be made by the California State Commission of Horticulture as provided for under sub-heading "Future Sales" of LIABILITY Clause, any dispute arising under this contract shall be immediately submitted to arbitration in either New York, Chicago, San Francisco, Baltimore, Boston, Buffalo, Cincinnati, Cleveland, Denver, Detroit, Indianapolis, Kansas City, Minneapolis, New Orleans, Oklahoma City, Omaha, Peoria, Philadelphia, Pittsburgh, Richmond, St. Louis, St. Paul, Seattle or Toledo. The particular city in which arbitration is to be held shall, in the absence of agreement by the parties, be in the city which is nearest to destination of shipment. Arbitrations in New York shall be held before the Dried Fruit Association of New York; in Chicago, before the Dried and Canned Foods Association; in San Francisco, before the Dried Fruit Association of California; in the remaining cities, by the joint arbitration boards appointed by the National Wholesale Grocers Association and the National Canned Goods and Dried Fruit Brokers' Association. A written statement of facts and anything else that may have proper bearing on the case, together with written argument thereon, may be presented to the Secretary of the Association or the Chairman of the Arbitration Board, as the case may be, and shall by him be submitted in its entirety to the arbitrators, but no oral presentation shall be made unless the parties agree thereto and same is permitted or requested by the arbitrators. If the decision is in favor of Seller, invoice, if unpaid shall become due and payable, at once. If decision is against Seller arbitrators shall determine amount of allowance which, if draft has been paid, shall be immediately refunded by Seller and if draft has not been paid, shall be deducted from invoice and the correct amount paid immediately. If arbitrators find bad faith or gross carelessness on the part of Seller they may either allow rejection, award damages therefor, or require another tender in compliance with this contract. Arbitration shall be held upon not less than one per cent (1%) unbroken and unopened packages. The arbitrators shall assess costs of arbitration and the decision shall be final and binding on both parties who hereby agree to comply therewith. Failure of Seller to ship or Buyer to accept shall be considered a dispute to be settled by arbitration. Each party hereby agrees that in the event of his failure to comply with the award of the arbitrators within ten (10) days of date of such award, an action in court shall lie against him, based upon such award.

Receipt of a copy of the within answer of Garcia & Maggini Co., a corporation, is hereby admitted this 5th day of June, 1922.

HAVEN, ATHEARN, CHANDLER & FARMER,
Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 5, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [16]

(Title of Court and Cause.)

Stipulation Waiving Jury.

IT IS HEREBY STIPULATED by and between the parties hereto that a trial by jury in the above-entitled cause may be and the same is hereby waived.

HAVEN, ATHEARN, CHANDLER & FARMER,
Attorneys for Plaintiff.
FRED L. DREHER,
Attorney for Defendant.

Dated this 31st day of Aug., 1922.

[Endorsed]: Filed Sep. 1, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

At a stated term, to wit, the March term, A. D. 1923, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Thursday, the 26th day of April, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable

GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this Court.

No. 16,703.

WASHINGTON DEHYDRATED FOOD CO.

vs.

GARCIA & MAGGINI CO.

Minutes of Court—April 26, 1923—Order for Judgment.

This cause heretofore tried and submitted, being now fully considered and the Court having filed its memorandum opinion, it is ordered that judgment be entered in favor of plaintiff and against defendant, in accordance with said opinion and on findings to be filed. [18]

(Title of Court and Cause.)

Findings of Fact and Conclusion of Law.

The above-entitled action came on regularly for trial before the above-entitled court sitting without a jury, a jury trial having been waived by the respective parties, on April 21, 1923. Messrs. Haven, Athearn, Chandler & Farmer appeared as attorneys for plaintiff and Fred L. Dreher, Esq., appeared as attorney for the defendant. Certain oral and documentary evidence was thereupon introduced and the Court having considered the same and the arguments of respective counsel, now signs the following as its

FINDINGS OF FACT.

I.

On June 13, 1919, plaintiff and defendant entered into a contract in writing for the sale by plaintiff to defendant of sixty thousand pounds of evaporated apples at a price of nineteen cents per pound, or a total contract price of Eleven Thousand Four Hundred ($11,400.00) Dollars. A true, full and correct copy of said contract is attached to defendant's answer in the above-entitled action as Exhibit 1.

II.

On or about January 17, 1920, plaintiff duly tendered to the defendant the delivery of the apples described in the aforesaid contract, and thereupon advised defendant that plaintiff was ready, willing and able to deliver said evaporated apples, in accordance with the terms of said contract, and demanded that defendant forthwith furnish plaintiff with shipping instructions for the shipment of said evaporated apples, as provided in said contract.

III.

Defendant failed and refused to furnish plaintiff with said or any shipping instructions, and on or about January 23, 1920, notified plaintiff that it, the said defendant, would not perform [19] the terms of the aforesaid contract, and has continuously failed and refused to perform the same.

IV.

On or about February 13, 1920, plaintiff notified defendant that unless defendant forthwith performed the terms of said contract and accepted delivery of said evaporated apples, plaintiff would

resell said evaporated apples and would hold defendant for any loss suffered thereby.

V.

On July 30, 1920, plaintiff sold said evaporated apples which were described in said contract, at a price of eleven and three-fourths (11–3/4) cents per pound, or a total sum of Seventy Hundred Fifty ($7,050.00) Dollars. Said sale was made within a reasonable time after the refusal of defendant to accept the delivery of said apples, and with due diligence and in good faith, and as soon as reasonably practicable, by a diligent, competent and prudent salesman, inspired by honesty of purpose and fair consideration for the defendant as well as for the plaintiff.

VI.

Subsequent to the demand by plaintiff of defendant for the performance of the terms of said contract, and prior to the sale of said evaporated apples by it, plaintiff segregated the apples covered by said contract in a warehouse, and paid storage upon the same in the sum of Three Hundred ($300.-00) Dollars, which expense was necessarily incurred by plaintiff in caring for said apples during said period.

VII.

The aforesaid contract of June 13, 1919, was never rescinded or canceled by the defendant, and the plaintiff never accepted or consented to such rescission or cancellation, and the obligations on the part of the defendant therein contained never were extinguished.

From the foregoing facts, the Court finds the following

CONCLUSION OF LAW.

Plaintiff is entitled to judgment herein against the [20] defendant for the sum of Forty-three Hundred Fifty ($4,350.00) Dollars, which is the difference between the contract price for the aforesaid apples and the amount received by plaintiff upon the resale thereof, together with interest upon said sum at the rate of six (6) per cent per annum from March 1, 1920, to date of judgment and also for the further sum of Three Hundred ($300.00) Dollars, expense of storage of said apples, with interest on said last named sum at the rate of six (6) per cent per annum from July 30, 1920, to date of judgment, and also for its costs of suit herein to be taxed.

Let judgment be entered accordingly.

Dated, April 27, 1923.

BOURQUIN,
United States District Judge.

Court advised by plaintiff's counsel defendant's counsel states "no objections."

Receipt of the within by copy is hereby admitted this 26th day of April, A. D. 1923.

FRED L. DREHER,
Attorney for Defendant.

[Endorsed]: Filed Apr. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [21]

(Title of Court and Cause.)

Judgment on Findings.

This cause having come on regularly for trial upon the 21st day of April, 1923, being a day in the March, 1923, term of said Court, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed; Thomas E. Haven, Esq., appearing as attorney for plaintiff and Fred L. Dreher, Esq., appearing as attorney for defendant; and the trial having been proceeded with and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation having filed its finding in writing and ordered that judgment be entered herein in accordance with said findings and for costs:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Washington Dehydrated Food Co., a corporation, plaintiff, do have and recover of and from Garcia & Maggini Co., defendant, the sum of Five Thousand Five Hundred Twenty-two and 96/100 ($5,522.96) Dollars, together with its costs herein expended taxed at $92.60.

Judgment entered April 27, 1923.

WALTER B. MALING,
Clerk. [22]

(Title of Court and Cause.)

Certificate to Judgment-Roll.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 27th day of April, 1923.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed April 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

United States District Court, California.

WASHINGTON ETC. CO.

vs.

GARCIA & MAGGINI CO.

(Opinion.)

In this action for breach of contract is no conflict in the evidence, but only in the inferences of fact and upon which depend plaintiff's right to and the amount of damages. The contract was made by and between plaintiff and defendant for sale and delivery of 60,000 pounds of dried apples at 19 cents per pound, delivery elected by plaintiff in

January, 1920. Plaintiff duly tendered delivery, but defendant contends of improper variety and that on its complaint they agreed to and did rescind the contract. At the time of and subsequent to tender were written communications between the parties, in which defendant rather strategically sought to impress plaintiff with the idea that therein the latter had agreed to rescind; but plaintiff repudiated that version of its language and acts and insisted upon the contract.

Defendant now contends for rescission in its claim therefor acquiesced in by plaintiff, which acquiescence plaintiff denies. It appears that upon plaintiff's tender of the apples, defendant asserted they were not the variety of the contract and refused to accept delivery. The next day plaintiff telegraphed defendant "we understand your wire * * * cancels order for car apples. Is this correct," to which the same day defendant by wire answered yes "as tender made by you cancels contract." Four days later, plaintiff wrote defendant the tender complied with the contract, "therefore none of the contentions in your correspondence are valid," and upon defendant answering that by plaintiff's aforesaid telegram of Jan. 24, plaintiff "agreed to cancellation": eleven days later plaintiff replied it had not so agreed and if defendant did not send shipping directions, plaintiff would sell the apples and bring suit for [24] "any difference." Rescission by claim thereof by one party acquiesced in by the other, appears from conduct of the latter, (1) affirmative acts inconsistent with continuance of the contract or (2)

negative acts of silence or delay calculated to and that do inspire the claimant of rescission with belief of consent, and upon which he acts or fails to act to his prejudice if the fact be otherwise, a variety of estoppel. In principle rescission by acquiescence has no other support or justification. That is not this case and there was no rescission. In the matter of resale of the apples, plaintiff immediately proceeded altho giving reasonable opportunity to defendant for reconsideration of its refusal of delivery. The time was February, 1920, and plaintiff was confronted by a poor, inactive and declining market aggravated by historical deflation and by like merchandise by the United States returned from Europe and thrown upon the market. All usual and reasonable and other ways and means were employed by plaintiff to accomplish resale, its manager even travelling extensively and to some of the great markets for dried fruits, but without avail until July 30, 1920, resale was made at the best price obtainable at 11¾ cents per pound. It appears plaintiff at the same time had three cars of like apples for sale, that this car of the contract was the first it succeeded in selling in 1920, and that it succeeded in selling its three cars only about a year later and for not slightly in excess of 5 cents per pound.

Having elected the remedy of resale, it was plaintiff's right and duty to resell in reasonable time. That is not determined by length of time alone in any case, but from a consideration of all circumstances of which elapsed time is one. See

cases, 42 L. R. A. (2) 683; Peck vs. Co. (La.) 59 So. 113, two years. Having notified defendant it would resell, plaintiff in a hunt for a market and a purchaser, was under no obligation to also give notice of time and place. Mechem, Sales, § 1637. The circumstances of this case require the inference that the resale was duly made in [25] reasonable time, as soon as reasonably practicable by a diligent, competent and prudent salesman and vendor inspired by honesty of purpose and fair consideration for the vendee as well as for the vendor.

In the matter of damages, intermediate defendant's default and resale, plaintiff segregated the apples in a warehouse, and thereon paid storage $300 and insurance $121.44. It also expended for its manager's travel in behalf of resale and also its three cars, $1,400. Altho, some dissent, by the weight of authority plaintiff is entitled to recover storage found reasonable and necessary, but obviously not travel expenses. See Penn vs. Smith, 93 Ala. 476. Nor is it entitled to recover insurance which so far as appears was exclusively for plaintiff's benefit and would benefit defendant not at all 26 C. Jur. 437. As payment was due 30 days after draft for the price, plaintiff is reasonably entitled to legal interest at the Washington (place of the contract) rate, from March 1, 1920, upon the difference between the contract price and the resale price, or $4,350, and likewise upon the cost of storage or $300 from July 30, 1920.

The parties may compute the amount thus found to be due plaintiff from defendant, and judgment accordingly is rendered.

April 26, 1923.

BOURQUIN, J.

[Endorsed]: Filed April 26, 1923. Walter B. Maling, Clerk. [26]

In the Southern Division of the District Court of the United States, for the Northern District of California, Second Division.

No. 16,703.

WASHINGTON DEHYDRATED FOOD CO., a Corporation,

Plaintiff,

vs.

GARCIA & MAGGINI CO., a Corporation,

Defendant.

Defendant's Engrossed Bill of Exceptions.

BE IT REMEMBERED that heretofore and after issue properly joined, the above-entitled cause came on for trial before said Court at a stated term thereof, holden in the city and county of San Francisco, State of California, in the Southern Division of said United States District Court in and for the Northern District of California, Second Division and on, to wit, the 21st day of April, 1923, oral and documentary evidence was presented on behalf of said plaintiff and on behalf of the said defendant and that the following proceedings, and none other, were had upon the hearing and trial of the said cause:

Testimony of Ira D. Cardiff, for Plaintiff.

IRA D. CARDIFF, a witness for plaintiff, heretofore sworn, testified as follows:

I am at present and ever since the organization of the Washington Dehydrated Food Company, a corporation, have been connected with the said corporation. On June 13, 1919, the date of the contract sued upon in this action, I was the general manager for the plaintiff corporation and am now the [27] president and manager. I have been manager of the corporation since its organization and am familiar with the negotiation of the contract sued on in this case and subsequent events in connection with an attempt on the part of the plaintiff to perform it. The business of the plaintiff is chiefly the manufacture of and dealing in dried fruits. Its central office is located at Yakima, State of Washington, and it also has an office at Wenatchee. At the time the contract was entered into it had offices also at Walla Walla and Grand View. As manager of the corporation I had occasion to become familiar with the market for dehydrated or dried apples, also called evaporated apples, in the State of Washington and elsewhere. My business required me to keep in touch with the market in general throughout the country and especially the Washington market and I have devoted a great deal of time to familiarizing myself with such markets. That was one of my chief duties.

The time of shipment designated in the contract

(Testimony of Ira D. Cardiff.)

sued upon herein is December or January, and means shipment during December, 1919, or January, 1920, and this was the understanding of the parties. I am familiar with the time and the manner under which the plaintiff attempted to fulfill the contract. On the 13th day of January, 1920, we in writing first requested the defendant for shipping instructions; on January 13, 1920, we sent the following letter to the defendant, which was admitted in evidence as

Plaintiff's Exhibit No. I.

"WASHINGTON DEHYDRATED FOOD CO.
Yakima, Washington.
January 13, 1920.

Garcia & Maggini Co.,
232 Drumm St.,
San Francisco, Calif.

Gentlemen:

If we are able to secure a car we shall probably be able to load the car of dried apples ordered from us [28] the latter part of this week. Inasmuch as you have never given us any shipping instructions upon this fruit will ask you to wire us immediately upon receipt of this letter your pleasure with reference to acceptance and shipment. Should you elect to inspect these apples at time of loading rather than accept our grades we

(Testimony of Ira D. Cardiff.)

would advise that the apples will be loaded from our Wenatchee factory.

Yours very truly,

WASHINGTON DEHYDRATED FOOD CO.

IRA D. CARDIFF,

General Manager."

IDC:HC.

"Mr. HAVEN.—I suppose, Mr. Dreher, it may be stipulated that the original correspondence, the letters coming to you, came in due course of mail from the plaintiff; and we will stipulate that the originals we have came from the defendant in due course of mail.

"Mr. DREHER.—Yes."

The following letter was received from defendant on the letter-head of defendant in reply to Plaintiff's Exhibit No. 1, which said letter was admitted in evidence as

Plaintiff's Exhibit No. II.

Jan. 16, 1920.

Washington Dehydrated Food Co.,
Yakima, Wash.

Gentlemen:

Replying to yours of the 13th, we will ask that you kindly mail us at once a sample of the apples you propose to deliver to us and to kindly advise us if in the event of our deciding not to ship the car now, what facilities there are for storage at Wenatchee.

Thanking you for giving this your prompt attention, we beg to remain,

Yours very truly,
GARCIA & MAGGINI,
Per A. ASHER.

AA:LH. [29]

We then wired the defendant asking definitely for shipping instructions as follows: Said wire was admitted in evidence as

Plaintiff's Exhibit No. III.

"A. 915 F. U. T. 8.

K. M. Yakima, Wn., 1912.
P. Jan. 17, 1920.

Garcia and Maggini Co., 104.
San Francisco, Calif.

Please wire immediately shipping instructions on car fruit.

WASHINGTON DEHYDRATED FOOD CO."

In response to the last wire we received the following reply from the defendant, which was admitted in evidence as

Plaintiff's Exhibit No. IV.

102 E. A. KG. 21 Night.

Jan. 17, 1920.

Washington Dehydrated Food Co.,
Yakima, Wash.

Referring wire even date writing fully under separate cover Stop Under no circumstances make shipment until you hear definitely from us.

GARCIA & MAGGINI.

We then wrote to defendant under date of January 20, 1920, as follows: Said letter was admitted in evidence as

Plaintiff's Exhibit No. V.

WASHINGTON DEHYDRATED FOOD CO.
Yakima, Washington.
January 20, 1920.

Garcia & Maggini Co.,
232 Drumm St.,
San Francisco, Calif.

Gentlemen:

We are in receipt of your favor of the 16th. In reply will state that we are wiring our Wenatchee office to send you immediately a 10 lb. sample of the fruit in question. We have also asked them to look up storage facilities and shall advise [30] you as soon as this information is available.

Yours very truly,
WASHINGTON DEHYDRATED FOOD CO.
IRA D. CARDIFF,
General Manager.

IDC: HC.

We then sent the following wire to defendant: Said wire was admitted in evidence as

Plaintiff's Exhibit No. VI.

WESTERN UNION TELEGRAPH CO.

A. 1040 SF. KG. 32 BLUE
KW. Yakima, Wash., 12 P. Jan. 22, 1920.

Garcia & Maggini,
San Francisco, Calif.

Can secure storage your fruit good brick warehouse responsible firm Wenatchee six cents per box

first month one cent per box each succeeding month (Shall we store here for you) Wire promptly.

WASHINGTON DEHYDRATED FOOD CO.

In reply to the last wire and in reply to our letter of the 20th of January, 1920, we received the following wire: Said wire was admitted in evidence as

Plaintiff's Exhibit No. VII.

143 E. A. N.–39 NL.

San Francisco, Calif., Jan. 23, '20.

Washington Dehydrated Food Co.

Yakima, Wash.

Referring your letter twentieth and wire twenty-third you are tendering us Choice Wenatchee stock whereas you sold us car Choice Yakima from your Yakima Evaporator Stop We sold Yakima and cannot tender our buyer Wenatchee therefore cannot accept.

Charge.

G&MCo. GARCIA & MAGGINI CO.

We received the following letter on the stationery of the defendant, January 24, 1920: Said letter was admitted in evidence as

Plaintiff's Exhibit No. VIII.

Jan. 24, 1920.

Washington Dehydrated Food Co.,

Yakima, Wash.

Gentlemen:

We are in receipt of your letter of the 20th in [31] which you say that you are wiring your Wen-

atchee office to send us a 10# sample of the fruit in question, in other words, a 10# sample of what you intend to deliver to us on contract calling for car of Choice grade. You also state that you have asked them to look up storage facilities.

We have their wire of the 23rd reading—"Can secure storage your fruit good brick warehouse responsible firm Wenatchee six cents per box first month one cent per box each succeeding month shall we store here for you promptly wire."

Now we are very much disappointed that you should have tendered us a car of Wenatchee apples as on June 22nd. we bought of you a car of your Yakima Choice Grade, from your Yakima plant and sold Yakima and our buyer will not accept Wenatchee.

You cause us all kinds of trouble in changing our contract originally calling for Oct/Nov to Dec/Jan and we have that fixed up with the buyer and now comes along a substitution of Wenatchee for Yakima.

We certainly have had our troubles on this car of apples and if we buy another car next year, we hope for smoother sailing.

As explained in our wire, we cannot deliver Wenatchee for Yakima and for the above reason cannot accept the car in question.

Regretting that we could not accept, we beg to remain

Yours very truly,
GARCIA & MAGGINI CO.

AA: LH Per————.

There is virtually no difference between Yakima apples and Wenatchee apples; both classes of apples are grown all throughout the central Washington district. One district is sort of generally known as the Wenatchee District and the other is generally known as the Yakima District. At the time of the contract we shipped all such apples as Yakima apples, and Yakima apples is a general name applied to all central Washington apples and are known by that designation to the trade.

On January 28, 1920 we sent the following letter to the defendant: Said letter was admitted in evidence as

Plaintiff's Exhibit No. IX.

WASHINGTON DEHYDRATED FOOD CO.

Yakima, Washington,

January 28, 1920. [32]

Garcia & Maggini Co.
232 Drumm St.,
San Francisco, Calif.

Gentlemen:

We are in receipt of your letter of the 24th. In connection with this matter, we have looked over carefully our wires and letters with reference to the car in question, and do not find any place that we have not tendered you Yakima apples. Attached hereto you will find a label such as the boxes in the car in question all carried. The car, by the way is Extra Choice, not Choice as you have assumed.

At any rate, your contract did not call for Yakima apples, therefore none of the contentions in your correspondence are valid.

Yours very truly,
WASHINGTON DEHYDRATED FOOD CO.
IRA D. CARDIFF,
IDC: HC. General Manager.

We enclosed in the last-mentioned letter the following label: Said label was admitted in evidence as

Plaintiff's Exhibit No. X.

WASHINGTON.

FRUIT

Net weight when Packed
50 Pounds
Retaining all Fruit
Salts
Flavors
Sugars
And Vitamine

EXTRA CHOICE
The Whole
Properties of
the Apple
Minus the
Water

Hero DEHYDRATED

Brand YAKIMA APPLES
Manufactured by
Washington Dehydrated Food Co.
Yakima, Wash.

On February 13, 1920 we forwarded to defendant the following letter: Said letter was admitted in evidence as

Plaintiff's Exhibit No. XI.

February 13, 1920.

Garcia & Maggini,
232 Drumm St.,
San Francisco, Calif.

Gentlemen:

Replying to your letter of the 2nd will state that we have looked carefully through our correspondence and fail to find anything in the same where we have agreed to the cancellation of your order for a car of apples. [33]

You made a definite contract for a car of apples which was tendered you within the time limit of the contract and we shall expect you to take delivery of the same. Unless we receive shipping instructions from you on the car in question within a few days we shall sell the same and charge any difference to your account, bringing suit to cover.

Yours very truly,
WASHINGTON DEHYDRATED FOOD CO.
By IRA D. CARDIFF,
IDC:D. Mgr.

After we mailed the letter of February 13, 1920, we made an attempt to sell the evaporated apples. We offered them for sale at virtually all centers where evaporated apples were handled throughout the country, chiefly through brokers and, in a few cases, direct to jobbers. Offers were made by telegrams and some few by letters. We sell evaporated apples all over the United States and in foreign countries too, in carload lots, and chiefly through

(Testimony of Ira D. Cardiff.)

brokers, which is the usual method of disposing of carload lots. Immediately after sending the letter of February 13, 1920, we took steps looking to the sale of the rejected carload of apples. I was very familiar with the condition of the market for such apples at or about February 13, 1920, chiefly in the northwest, but I was also familiar with conditions throughout the country. At that time and now am familiar with what the market was at the times referred to.

"Q. What was the condition of the market in the Northwest and throughout the country at the time of the date of this letter, February 13, 1920, and also on January 24, 1920, if there was any difference?

"Mr. DREHER.—If the Court please, I object to the question as immaterial, irrelevant and incompetent, and if there is any breach of a contract here the market price as of the date of the breach, the date of delivery, should cover, and not sometime subsequent, which is February 13th.

"Mr. HAVEN.—January 24th was the date of the first refusal.

"The COURT.—It would be the price at or about that time. Of course, the real price upon which the damages would be based [34] would be the price that he received, assuming, of course, due diligence and good judgment in the sale. It would not be the exact price on the day of the breach. It depends, of course, upon what you call the day of the breach. He may answer the question; in so far as it is not

(Testimony of Ira D. Cardiff.)

material or competent, the Court will give it no consideration in making up its decision. For the record, the objection will be overruled and an exception may be noted.

A. There was no such thing as a market at that time, in the generally accepted use of that term in the trade. The market was dead."

EXCEPTION No. 1.

The chief reason for the fact that there was no such a thing as a market for evaporated apples at that time was because the United States Government was bringing back evaporated apples and fruits from Europe and throwing them on the market in large quantities for anything that was offered for them. Such conditions prevailed during the months of January, February, March, and April of 1920. During the months of January and February, 1920, I did not succeed in making a sale of the rejected apples. We continued our efforts to sell them. We wrote and wired first offering at prices, then reduced prices, and finally solicited brokers and dealers to make us an offer on them. We received no offers and could get no offer of any kind. In May the Board of Directors of the plaintiff corporation sent me east or throughout the country to make an effort to sell the rejected carload and three other cars of similar product which we had on our hands and which belonged to us. I made a trip to all the centers where dried fruit is sold in the country, virtually from Denver and Billings to Boston and all intervening territory, travelling it over several

(Testimony of Ira D. Cardiff.)

times. I was gone more than two months making an effort to clear up this fruit and in the latter part of July we sold a car to Libby, McNeill & Libby at Chicago for eleven and three quarter cents (11–3/4¢) per [35] pound, f. o. b. Pacific Coast shipping point, which was the same condition as to shipment as in the contract sued upon herein. That was the first carload of apples we sold that calendar year. We had been endeavoring to make such a sale all that year. The contract called for sixty thousand (60,000) pounds net at nineteen cents for Extra Choice. We received for these sixty thousand (60,000) pounds upon the resale eleven and three quarter cents per pound, or the sum of Seven Thousand Fifty (7050) Dollars. The total contract price was Eleven Thousand four Hundred (11,400) Dollars. I sold more than sixty thousand pounds to Libby, McNeill & Libby on that trip. The sale to the last-mentioned firm did not designate any definite poundage and accordingly when I sold a carload lot to Libby, McNeill & Libby, I instructed our house to get the largest car and fill it full. The warehouse got something like seventy thousand (70,000) pounds in the car. The evaporated apples sold to Libby, McNeill & Libby were the specific apples contracted to be sold to the defendant and had been segregated in our warehouse by setting them aside in a block by themselves. We had notified the defendant that we had so set them aside for them. In the sale of these apples and in the storage thereof, we incurred warehouse expense and insurance and we had to pay

(Testimony of Ira D. Cardiff.)

interest in the sum of Five Hundred One and 60/100 Dollars. In our letter of September 25, 1920, we attached an invoice, made up under my direction, setting forth the items of our expense. Said letter was admitted in evidence as

Plaintiff's Exhibit No. XII.

WASHINGTON DEHYDRATED FOOD CO.

Yakima, Washington.

September 25, 1920.

Garcia & Maggini Co.

San Francisco, California.

Gentlemen:

We have just sold the car of evaporated apples, the order for which you attempted to cancel in your wire of January 23rd, and for which you refused to pay our draft #120, under date March 6th. These apples were finally sold at 11–3/4¢ per pound. You, therefore, are indebted to us as per attached [36] invoice.

Will thank you for your prompt remittance to cover, and in case, as you have intimated in your previous letters, that you do not intend to abide by your contract for this car of fruit, we will ask that our differences on the contract be immediately submitted to arbitration in Seattle.

Thanking you for your prompt attention to this, we remain,

Yours very truly,

WASHINGTON DEHYDRATED FOOD CO.

By IRA D. CARDIFF,

IDC: GC. Manager.

(Testimony of Ira D. Cardiff.)

We never received any answer from the defendant to our letter of September 25, 1920.

"Mr. HAVEN.—I call attention to the fact, your Honor, that the contract contains an arbitration clause, upon the back of it, providing that under certain conditions arbitration shall be had before certain bodies."

The witness continued: I am familiar with the expenses in the invoice and I know that they were necessarily incurred in connection with the car of these apples, after the refusal to accept them and prior to their resale. Said invoice was admitted in evidence as

Plaintiff's Exhibit No. XIII.

Statement of Account with—

WASHINGTON DEHYDRATED FOOD CO.

Yakima, Wash. Sept./24, 1920.

Garcia & Maggini Co.

San Francisco, Calif.

Date		Debits.	Credits.
1920	First tendered 1/17/20 Fruit placed in storage and draft for G&M account 3/6/20.....		
March 6th	To balance.....		
	1200 boxes Ex. Ch. Evap. apples.....		
	To Merchandise.		
	60000 # @ 19¢	11400.00	
	Protest fee on draft..	5.00	

(Testimony of Ira D. Cardiff.)

	Storage 5 mo. @ 2.00 per ton per mo.	300.00	
	Insurance Premium 5 mo.	121.44	
	Interest on $11400 6 mo. and 18 days at 8%	501.60	
Sept. 24th.	Credit by sale of car @ 11-3/4¢		7050.00
		$12328.04	$7050.00
	Balance		$5278.04

Q. Do you know whether or not you incurred storage charges? A. We did. [37]

Mr. DREHER.—I object to that as immaterial, irrelevant and incompetent, because that would not be an item of damage.

The COURT.—As the Court stated heretofore, it will be admitted, and if not competent or material it will receive no consideration. The objection is overruled and an exception may be noted. The witness has answered the question.

Mr. DREHER.—At this time in order to save time, possibly, may it be understood that my objection will run to all these questions with reference to the items of expense incurred by the plaintiff corporation?

The COURT.—Yes, it will, and the record may show the fact.

Mr. HAVEN.—Q. Can you state what the storage charge incurred upon these apples was during

(Testimony of Ira D. Cardiff.)

the period that I have mentioned, after the rejection or refusal to accept, and prior to the sale?

A. If I recall it, the invoice is five months at $2.00 per ton month.

Q. How many tons were there? A. 30 tons.

Q. The total amount of storage, then, would be how much? A. $300.00.

Q. Was that the usual storage rate at the place where these apples were stored?

A. We were buying storage right along there, and we were paying from $2. to $3.20 per ton, or something like that we gave them the benefit of the lowest storage.

Q. You charged them the minimum amount that you, yourself, were paying at Wenatchee; is that it? A. That is correct.

Q. In the invoice that you have in your hand, and which is referred to in this letter, you also included an item of interest; how do you compute that?

A. The interest on $11,400 for six months and eighteen days at eight per cent.

Q. That time ran from when?

A. That time ran from the time that the apples were definitely tendered—whatever that letter shows, about the 1st of February, until we received the money for them from Libby, McNeill & Libby, on September 24th.

Q. That is when you received the money from the amount of the sale you made to Libby, McNeill & Libby? A. That is correct.

(Testimony of Ira D. Cardiff.)

Q. How much was the interest that you figured in that manner?

A. $501.60. We figured interest at 8% because we were obliged to pay that rate.

EXCEPTION No. 2.

On October 14, 1920, we wrote defendant the following letter, to which we received no reply. Said letter was admitted in evidence as

Plaintiff's Exhibit No. XIV. [38]

Yakima, Wash. October 14, 1920.

Garcia & Maggini,

San Francisco, California.

Gentlemen:

We wrote you several weeks ago with reference to your account with us, but to date have received no reply. We will ask you, therefore, to give this matter your early attention and advise us what you expect to do with reference to this account.

Yours very truly,

WASHINGTON DEHYDRATED FOOD CO.

By IRA D. CARDIFF,

Manager.

Q. You stated, Doctor, you were endeavoring to sell some cars of apples belonging to your company, as well as these covered by this contract; when, if at all, did you sell these other cars?

A. The bulk of them were sold almost a year later.

Q. During the intervening time, what, if any, effort did you make to sell those apples?

(Testimony of Ira D. Cardiff.)

Mr. DREHER.—That is objected to as immaterial, irrelevant, and incompetent, and having no bearing on the issues in this case, and particularly having no bearing on the measure of damages.

The COURT.—What is the purpose of it?

Mr. HAVEN.—The purpose of it is to show good faith in making a sale of the other apples first, and that we made a continuous attempt to sell these apples.

The COURT.—Objection is overruled.

Mr. DREHER.—Exception.

A. We made constant and vigorous efforts to sell them.

EXCEPTION No. 3.

Mr. HAVEN.—Q. And you sold the others just as soon as you could, after having sold the apples under this contract, did you? A. Yes, sir.

Q. At what price did you sell them?

Mr. DREHER.—I object to the question as immaterial, irrelevant and incompetent, and having no bearing on the issue of damages.

The COURT.—I rather think so; still, he has advanced a theory that seems impossible on its face, yet I will allow the answer to go in; if not material, the Court will give it no consideration.

A. The Extra Choice grades, which was the same as those tendered, netted us slightly in excess of five cents per pound.

EXCEPTION No. 4. [39]

Mr. HAVEN.—Q. Speaking of Extra Choice grades, those are the character of apples referred to in the contract which is in controversy here?

(Testimony of Ira D. Cardiff.)

A. Yes.

Mr. DREHER.—That is assuming a fact not in evidence, your Honor.

The COURT.—The contract specifies Choice, with a provision for Extra Choice under certain circumstances.

Mr. HAVEN.—Q. Referring to the apples which you tendered to the defendant, and which the defendant refused to accept, and which you subsequently sold, as you testified, to Libby, McNeill & Libby, I ask you what grade of apples those were?

A. Extra Choice.

Q. Which one of the designated varieties or grades in this contract did the apples tendered comply with? A. The Extra Choice.

Q. At 19 cents a pound? A. Yes, sir.

Q. That is a well-known grade of dried apples, is it? A. Yes, a standard grade.

Q. Which of the two classes of apples, Yakima or Wenatchee, if there are two different classes, which of them, if either, would correspond to the apples designated in the contract as Extra Choice Apples?

A. We make Extra Choice and Extra Fancy, both at Wenatchee; occasionally we make Choice there; mostly Extra Choice, and Fancy, because at Wenatchee we were able to get a little better raw material, and, therefore, made a little better product.

Q. And if there was any difference between the products, the Wenatchee apples were a little better than the Yakima? A. Yes.

(Testimony of Ira D. Cardiff.)

Q. Your contract, under which you attempted to make delivery, called for Extra Choice apples; now, I ask you what apples which you were handling would correspond or fulfill the condition of your contract as Extra Choice apples?

A. The ones we tendered were Extra Choice apples.

Q. Were there any others?

A. We manufacture four grades of apples; Choice, Extra Choice, Fancy and Extra Fancy. The contract gave us the privilege of filling the order with either Choice, Extra Choice, or Fancy; we elected to fill it with Extra Choice.

Q. And you elected to fill it from Wenatchee, the correspondence shows.

A. That was merely a matter of convenience in warehousing.

Q. The correspondence shows some objection on the part of the defendant in filling it from Wenatchee rather than Yakima: What is the difference between those two?

A. There is none. We notified them that if they preferred to have them from Yakima they could have them.

Q. Would the apples from Wenatchee correspond to the designation just as much as the Yakima apples would? A. Certainly.

Mr. HAVEN.—I have here a letter from our firm, as attorneys [40] for the plaintiff, addressed to Garcia & Maggini, dated June 22, 1921, on the general subject in controversy. It is stipulated be-

(Testimony of Ira D. Cardiff.)

tween counsel that this letter renews the offer and the request for arbitration of the dispute. This was dated June 22, 1921; Garcia & Maggini have the original received about that time.

Mr. DREHER.—The stipulation is made in so far as the letter is competent; I do not think it has any bearing on the matter.

The COURT.—Very well.

Mr. HAVEN.—Take the witness."

Cross-examination.

There is no difference between the apples grown in the Yakima District and the apples grown in the Wenatchee District. The situation is thus; At Wenatchee we have very little competition or not nearly so much competition as we have at Yakima. We can therefore pick and choose better apples at Wenatchee than we can at Yakima and therefore we can get better quality raw material. The apples grown in the two districts are identical. The two districts are about 50 miles apart with a range of hills between. The apples manufactured at the Wenatchee plant come from the district immediately adjoining Wenatchee and those manufactured at the Yakima plant come from that vicinity. I did not personally attend to the segregation of the car of apples for the defendant company. I do not recall that I was in the warehouse when the segregation was taking place, but I was in there shortly after it had been done and saw the segregated material. It bore a warehouse tag designating what it was set

(Testimony of Ira D. Cardiff.)

aside for. The particular car segregated contained extra choice evaporated apples, but there were no choice evaporated apples at Wenatchee at the time referred to, but there were Choice Evaporated Apples at Yakima, about half a car to a car; at least half a car, as nearly as I can approximately estimate at this time. The car of apples for the defendant bore a label designating them as Yakima apples. All of our apples from the Wenatchee factory were designated as Yakima Apples at that time. Since then we have made a slight change in the label, but virtually all of the apples we have ever [41] shipped out of any of our Washington plants, whether from Walla Walla, Grand View, Wenatchee or Yakima, have been according to the label introduced in evidence.

Mr. DREHER.—Q. I believe there was some letters and some telegrams passing between the parties that were not offered in evidence. I have a telegram that was sent to us. Mr. Cardriff, I show you a carbon copy of a telegram which is purported to have been sent by your company to the Garcia & Maggini Company, and I ask you if that is a carbon copy of a telegram that you sent to Garcia & Maggini on January 24, 1920? A. It is.

Mr. DREHER.—I offer in evidence as Defendant's Exhibit "A," a telegram dated January 24, 1920, to Garcia & Maggini.

Mr. HAVEN.—One moment. I want to object to that. I object on the ground that it is not proper cross-examination. It is a part of the defendant's

(Testimony of Ira D. Cardiff.)

case, if at all. And as a part of the defendant's case it is immaterial, irrelevant and incompetent, because it does not prove or tend to prove the affirmative defense, and that is the only issue it is material on.

The COURT.—Well, I would have to hear it anyway in order to rule on the objection. I think it might be material as part of the general correspondence. Objection overruled.

Mr. HAVEN.—Exception.

Mr. DREHER.—It reads as follows: Said telegram was admitted in evidence as

Defendant's Exhibit "A."

POSTAL TELEGRAPH.

Jan. 24, 1920.

Garcia & Maggini,

San Francisco, Calif.

We understand your wire twenty-third cancels order for car apples. Is this correct. Wire.

WASHINGTON DEHYDRATED FOOD CO.

We received in reply the following wire from defendant: Said wire was admitted in evidence as

Defendant's Exhibit "B."

17 E. H. P. A. 20. 2:15 PM. Jan. 24, 1920.

San Francisco, Calif.

Washington Dehydrated Food Co.,

Yakima, Wash.

Replying your wire even date your understand-

(Testimony of Ira D. Cardiff.)

ing correct as tender made by you cancels contract dated June thirteenth nineteen nineteen.

GARCIA & MAGGINI CO.

2:43 PM. [42]

"Mr. HAVEN.—The same objection to this wire, your Honor.

The COURT.—Like ruling.

Mr. HAVEN.—Exception."

Q. Your counsel does not have the original of the letter addressed to you on February 2, 1920; I have the carbon copy. I ask you, do you recall receiving a letter of that nature on or about the date of that letter? A. What is the date?

Q. February 2, 1920. It might be stipulated, Mr. Haven, that you have a copy of this letter in your file, and that that file was given to you by Mr. Cardriff.

Mr. HAVEN.—Yes.

A. Yes, I think we received that all right.

Mr. DREHER.—We offer this in evidence, a carbon copy of a letter which may be introduced as the original, by stipulation, and ask that it be marked Defendant's Exhibit "C." It reads as follows:

Defendant's Exhibit "C."

Feb. 2, 1920.

Washington Dehydrated Food Co.
Yakima, Wash.

Gentlemen:

Acknowledging receipt of yours of the 28th, we

(Testimony of Ira D. Cardiff.)

refer you to your wire of Jan. 24th, wherein you agreed to cancellation of car of apples and asked us to advise you if your understanding was correct, namely, that the car was cancelled.

We replied to same saying, "Replying your wire even date your understanding correct, as tender made by you cancels contract dated June 13, 1919.

Respectfully yours,

GARCIA & MAGGINI CO.

Per AA.

AA:LN.

Mr. HAVEN.—I desire to have the same objection to that, your Honor.

The COURT.—There will be a similar ruling.

Mr. HAVEN.—Exception.

Mr. DREHER.—Q. I show you a letter dated March 6, 1920, signed by yourself, addressed to Garcia & Maggini, and I ask you if that letter was signed by you and mailed to the defendant in this action? A. Yes, sir.

Mr. DREHER.—We offer in evidence, as Defendant's Exhibit "D," this letter:-

Defendant's Exhibit "D." [43]

WASHINGTON DEHYDRATED FOOD CO.

Yakima, Washington.

March 6, 1920.

Garcia & Maggini Co.,
232 Drumm St.,
San Francisco, Calif.

Gentlemen:

Not having received any definite shipping in-

(Testimony of Ira D. Cardiff.)

structions from you with reference to the car of apples purchased from us, we are drawing upon you for this car to-day with warehouse receipt attached to draft. We shall expect this draft to be taken up immediately.

In case you have a real preference for apples from our Yakima plant, we will ask you to advise us by wire and we shall withdraw the above draft and issue a new draft and warehouse receipt from Yakima. However, in doing this, we should want to ship approximately half the car Choice and half Extra Choice, instead of all Extra Choice as in the case of the Wenatchee shipment.

Yours very truly,

WASHINGTON DEHYDRATED FOOD CO.

IRA C. CARDIFF,

General Manager.

IDA:HC.

WITNESS.—(Continuing.) In our letter of September 25th we stated "We have just sold a car of apples." As a matter of fact, the car was sold on July 30, 1920, but we collected the money on the date mentioned on the invoice, the 24th of Sept., 1920.

Testimony of Arthur C. Oppenheimer, for Defendant.

ARTHUR C. OPPENHEIMER, a witness for defendant, heretofore sworn, testified as follows:

I am vice-president and general manager of Rosenberg Bros. & Co., who has been engaged in

(Testimony of Arthur C. Oppenheimer.)

handling dried fruits for twenty-six years and was in that business during the years 1919, 1920. It has been my business and custom to keep in touch with the market, market prices and conditions of dried fruits of all kinds. I am familiar with the market conditions, with particular reference to evaporated apples during the years 1919 and 1920. Some old records which I have with me reflect the market conditions existing with reference to evaporated apples during 1919 [44] and 1920, but I cannot remember back to those years.

Q. What would you say was the fair market price of evaporated apples, choice grade, during the month of January, 1920?

Mr. HAVEN.—That is objected to as immaterial, irrelevant and incompetent, first because the place is not specified; second, because the witness' statement is that he has gone over some old records, and it does not appear who kept the records; third, that the market price is entirely immaterial because it appears that the plaintiff sold the apples, and that fixes the measure of damages, after having served notice on the defendant. The measure of damages is fixed by what could be obtained by a fair sale in the usual manner. It is not material what the market price was at that time.

The COURT.—A range of prices might be shown. They are not bound to accept your conclusion that you sold at the proper price at the proper time. The objection is overruled. In so far as it is not

(Testimony of Arthur C. Oppenheimer.)

material, the Court will give it no consideration. I think there ought to be some price fixed, however.

Mr. DREHER.—Very well, your Honor.

WITNESS.—(Continuing.) Washington apples usually bring a little higher price than California apples, but a great many times they are sold on the same basis.

"Mr. DREHER.—Take the price prevailing for Wenatchee apples, or Yakima apples at Wenatchee, and the price of the same apples at San Francisco, how would the market vary—would there be any relation between the various prices at the same time, or would it be all on the same basis?

A. Practically on the same basis. Sometimes the Washington apples bring more than the California apples.

Q. Would that be an f. o. b. price?

A. An f. o. b. price."

At the end of January, 1920, the fair market value [45] of Choice Evaporated Apples from the Washington District f. o. b. Pacific Coast shipping points, was between seventeen and nineteen cents, both for Choice and Extra Choice grades. The market value for evaporated apples f. o. b. Pacific Coast shipping points was lower in February, 1920, than it was in January, about a cent to two cents per pound lower.

(It was stipulated that all the above evidence was received subject to the same objection by Mr. Haven as above stated.)

(Testimony of Arthur C. Oppenheimer.)

Cross-examination.

My testimony as to market price is based on world conditions. I would not say there was an active market in January and February, 1920, a world market for dried or dehydrated apples. January is not an active apple market. The market grew worse in 1920, and from January, 1920, on, the market for evaporated apples went down all the time and kept going down. It grew worse in February. I cannot recall the July market value right now. I cannot recall it because I have not looked up records. The information I have given is based on actual sales made in January and February, 1920. I have the contracts of sale with me. The market price for dehydrated apples during March, 1920, was about fourteen cents. I do not know what the market was in April because I have not looked up records any further than March. My knowledge of the market prices is based upon actual sales which make the market. Some of these sales were carlots and some less than carlots. In March, 1920, it was very difficult to sell any carload lots of dried apples, but we sold some carload lots in January and February, 1920. We sold about three cars in January, 1920, and two cars in February, 1920. These sales and [46] deliveries were not made on contracts entered into prior to January, 1920. We start the new business off with January deliveries and always try to have deliveries attended to under previous contracts before the

(Testimony of Arthur C. Oppenheimer.)

first of January. All of the contracts, concerning which I have been just testifying, and upon which deliveries were made, were made after the first of January, 1920. On January 8, 1920, we sold twelve hundred boxes of evaporated apples at eighteen cents a pound. On February 17, 1920, seventy-six thousand pounds were sold at 15½¢ per pound. They were all sales in carload lots and made in San Francisco. The amount of sales of carloads of apples made in a month depends entirely upon the market. January and February are not good apple months at any time. The market price in the latter part of January, 1920, was very much less than it was in the latter part of the month of January, 1919. My testimony is based on the contracts I have with me and the knowledge I have of the business, buying and selling apples at all times and, of course, brushing up my memory by going through these contracts. My firm has had some disputes with the plaintiff over similar contracts, but they were all settled amicably and in our favor.

Redirect Examination.

The grade of apples sold February, 1920, 76,000 lbs., at 15½¢ a pound, were of different grades. Some were Extra Choice and some not full Extra Choice. On January 8, 1920, we sold 1200 boxes of Extra Choice evaporated apples at 18¢. There are 1200 boxes in a car.

Testimony of Pauline Bartholme, for Defendant.

PAULINE BARTHOLME, witness sworn on behalf of defendant testified as follows:

I am secretary to the publisher of the "California Fruit [47] News." The concern with which I am connected keeps a record of the market conditions and the market prices of dried fruits. It publishes a trade paper giving market prices on all dried fruits. In order to gather the information for the purposes of this publication the publisher calls on the trade, gets their various prices, and then gets a running market price and publishes that as the market price of the week. This has been our custom since 1883. The publication is made regularly every week.

"Q: Have you the records showing the market price, the market value of evaporated apples during the months of January and February, 1920,—f. o. b. prices? A. Yes, f. o. b. California.

Q. Let me see what you have there, please. Refer to the latter part of January, 1920.

A. The January 31st issue.

Q. The file you have referred to here, 'Apples,' that refers to evaporated apples, does it?

A. Evaporated apples; yes, sir.

The COURT.—If you mean to offer it, counsel proceed.

Mr. DREHER.—I offer in evidence, if the Court please, the issue of the 'California Fruit News,' as of January 31, 1920, showing the quotations on

(Testimony of Pauline Bartholime.)

evaporated apples: Choice in 50 pounds at 17½ cents; extra choice, 50 pound boxes, 18¼; fancy, 50 pound boxes, 20 cents.

Mr. HAVEN.—I object to that as immaterial, irrelevant and incompetent, in as much as it does not appear upon what information this publication is based, and, for that reason, it is hearsay.

The COURT.—I have no doubt it is like the ordinary market reports in all newspapers; as far as that is concerned, the objection is overruled.

Mr. HAVEN.—It is objected to further, if I may state my objection, that it is immaterial, irrelevant and incompetent.

The COURT.—In so far as it is not competent, the Court will give it no consideration.

Mr. HAVEN.—In that it does not relate to any issue in this case, and is no proof of the amount of damages.

The COURT.—The objection is overruled. [48]

Mr. DREHER.—Q. The next issue is what?

A. February 7.

Mr. DREHER.—We offer in evidence the issue of the paper showing choice apples in 50 pound boxes, 17¼ cents; extra choice, 50 pounds, 18 cents; fancy 20 cents; f. o. b. California shipping points.

Mr. HAVEN.—It may be considered that my objection runs to all these?

Mr. DREHER.—Yes.

The COURT.—What do you mean 'f. o. b. California shipping points'?

(Testimony of Pauline Bartholime.)

Mr. DREHER.—Placed in cars for shipment, for eastern shipment or for shipment to some other point.

The COURT.—That is the California price?

Mr. DREHER.—That is the California price. The last witness stated that the f. o. b. price, Pacific Coast Shipping point, whether it is Wenatchee, Yakima, or San Francisco, would be the same.

The COURT.—It would not be if you were going to buy your apples at Wenatchee and ship them down here.

Mr. DREHER.—That is very true, your Honor, but if they are purchased for eastern points the prices would be the same that the last witness testified.

The COURT.—Where were these apples in suit to be delivered?

Mr. DREHER.—It does not say. My witnesses are taken out of order, your Honor; the next witness will take that matter up.

The COURT.—Very well, proceed.

Mr. DREHER.—The next issue is the 14th of February; the price for choice, 50 pound boxes, 17; extra choice 17½; fancy, 20.

For February, 1921, the price of choice is 16 to 16½; extra choice 16½ to 17; fancy, 18½ to 19.

That is all."

Cross-examination.

I do not personally know where the information came from upon which the market price in our publication is based. I did not get it—the publisher

(Testimony of Pauline Bartholime.)

got it. I am secretary of the concern and have charge of the office. I do not know whether sales of dehydrated apples were actually made at the prices set forth in our publication. I do not know anything about the sales. [49]

"Mr. HAVEN.—While this is here, I offer the record for the subsequent months in 1920. The last one put in was February 21, 1920. I also offer in evidence, in connection with the evidence of this witness the preliminary reports in connection with these tabulations, in the issue of February 21, 1920, the publication stating: 'A very quiet dried fruit market is ruling in California, as is practically every variety in this line this week. Inquiry is small, and holders of goods are inclined to shade values to affect prices.'

"I read from the issue of February 14, 1920, from which quotations have been made: 'Generally speaking, the dried fruit market is easy.'

"Reading also from the issue of February 7, 1920: 'The spot dried fruit market is rather uninteresting and quiet at the moment.' "

"The defendant offered the record up to February 21, 1920. I now offer the record for the subsequent issues.

The COURT.—To what extent?

Mr. HAVEN.—I am offering first—

The COURT.—To what extent do you propose to offer them?

Mr. HAVEN.—You mean how far?

The COURT.—Yes.

(Testimony of Pauline Bartholime.)

Mr. HAVEN.—Down to the date of our sales.

The COURT.—You must produce it in some condensed form. We will not sit here and listen to the reading of all that. It is not proper cross-examination.

Mr. HAVEN.—May I offer up to the 1st of March?

The COURT.—Very well.

Mr. HAVEN.—Under the issue of February 28, 1920: 'An exceedingly quiet market continues in dried fruit generally, both California and elsewhere. A small supply only available here from first hand.'

The price in this issue of February 28, 1920, is as follows: 'For Extra Choice in 50's, 16 to 16½.'

In order not to take the time of the Court I will ask to read into evidence the quotation on April 17, 1920. Extra Choice, 13¼.

Skipping another month, to May 22, 1920, the quotation at that time was 12 cents.

I offer to read from the publication of July 17, 1920, this, in which extra choice were quoted at 11¾.

That is all." [50]

Testimony of Ira D. Cardiff, for Plaintiff (Recalled in Rebuttal).

IRA D. CARDIFF, a witness for plaintiff heretofore sworn, being recalled for rebuttal testified as follows:

I am familiar with the market quotations which have been read from this publication, but whether

(Testimony of Ira D. Cardiff.)

or not sales are made at the figures and upon the market quotations read from the publication depends upon the market conditions. If the market is good, sales are frequently made and, in fact, usually are, under those quotations, but it is to the interest of the people giving that information to the publication to keep the quotations as high as possible.

SPECIFICATION OF PARTICULAR ERRORS OF LAW.

I.

That the Court erred in admitting evidence over the objection of defendant and in not sustaining defendant's objection to the offer of plaintiff to show the market conditions of dehydrated apples in the northwest and throughout the country on the 13th day of February, 1920, or at any time subsequent to the 30th day of January, 1920.

II

The Court erred in admitting evidence over the objection of defendant and in not sustaining defendant's objection to the offer of plaintiff to show and prove as a measure of proper damage the item of the expense for storage of the dehydrated apples, the subject matter of the contract.

III.

The Court erred in admitting evidence over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff of evidence of the sale of some cars of dehydrated apples,

other than the specific car of apples contracted for by and between the plaintiff and the defendant, which specific car of apples was the subject matter of the suit between plaintiff and defendant. [51]

IV.

The Court erred in admitting evidence over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff of evidence of the price realized by the plaintiff upon the sale of some cars of apples other than the specific cars of apples contracted for by the plaintiff and defendant, the subject matter of the suit between plaintiff and defendant.

V.

The Court erred in holding and deciding that the measure of damages to be awarded to the plaintiff was the difference between the contract price of the dehydrated apples and the price realized upon the resale thereof and in awarding judgment to plaintiff based upon such difference.

VI.

The Court erred in weighing and considering evidence and making a finding of fact that "on or about January 17, 1920, plaintiff duly tendered to the defendant the delivery of the apples described in the aforesaid contract, and thereupon advised defendant that plaintiff was ready, willing and able to deliver said evaporated apples, in accordance with the terms of said contract, and demanded that defendant forthwith furnish plaintiff with shipping instructions for the shipment of evaporated apples, as provided in said contract."

VII.

The Court erred in weighing and considering evidence and making a finding of fact that "defendant failed and refused to furnish plaintiff with said or any shipping instructions, and on or about January 23, 1920, notified plaintiff that it, the said defendant, would not perform the terms of the aforesaid contract, and has continuously failed and refused to perform the same." [52]

VIII.

The Court erred in weighing and considering evidence and making a finding of fact that "On July 30, 1920, plaintiff sold said evaporated apples which were described in said contract, at a price of eleven and three-fourths (11¾) cents per pound, or a total sum of Seventy Hundred and Fifty ($7050) Dollars. Said sales was made within a reasonable time after the refusal of defendant to accept the delivery of said apples, and with due diligence and in good faith, and as soon as reasonably practicable, by a diligent, competent and prudent salesman, inspired by honesty of purpose and fair consideration for the defendant as well as for the plaintiff."

IX.

The Court erred in weighing and considering evidence and making a finding of fact that "Subsequent to the demand by plaintiff of defendant for the performance of the terms of said contract, and prior to the sale of said evaporated apples by it, plaintiff segregated the apples covered by said con-

tract in a warehouse, and paid storage upon the same in the sum of Three Hundred ($300) Dollars, which expense was necessarily incurred by plaintiff in caring for said apples during said period."

X.

The Court erred in weighing and considering evidence and making a finding of fact that "The aforesaid contract of June 13, 1919, was never rescinded or cancelled by the defendant, and the plaintiff never accepted or consented to such rescission or cancellation, and the obligations on the part of the defendant therein contained never were extinguished."

XI.

The Court erred in not holding and deciding and making a finding of fact that the contract sued upon was cancelled by agreement of the plaintiff and the defendant on or about the 23d day of January, 1920. [53]

XII.

The Court erred in not holding and deciding and making a finding of fact that the contract sued upon was breached by the defendant on January, 1920, and that on said last mentioned date the said breach was accepted and acted upon by the plaintiff.

XIII.

The Court erred in not holding and deciding and making a finding of fact that the market price for dehydrated apples of the kind and quality contracted for on January 23, 1923, and for a reasonable time thereafter f. o. b. Pacific Coast rail ship-

ping point was between seventeen cents and nineteen cents a pound.

XIV.

The Court erred in not holding and deciding and making a finding of fact that there was an active buying market for dehydrated apples of the type, quality and quantity contracted for, during the months of January, February and March, 1920, and that during the said last above mentioned months the market price for said apples at Pacific Coast rail shipping point was as follows:

During January, 1920 ..... 17¢ to 19¢ per lb.
During February, 1920 ..... 16¢ to 18¢ per lb.
During March, 1920 .. .. 14¢ per pound.

IT IS HEREBY STIPULATED that the above and foregoing may be settled and allowed as and for the bill of exceptions herein and that the same may be signed by the Trial Judge outside of the district without objection; or may be settled and signed by any Judge of this court in San Francisco, California.

HAVEN, ATHEARN, CHANDLER & FARMER,

_____,

Attorneys for Plaintiff.

FRED L. DREHER,

Attorney for Defendant.

Dated: San Francisco, California, July 3, 1923.

[54]

The foregoing bill of exceptions is hereby settled and allowed.

M. T. DOOLING,
Judge.

Dated: July 3, 1923.

[Endorsed]: Filed Jul. 3, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [55]

(Title of Court and Cause.)

Petition for Allowance of Writ of Error.

Comes now Garcia & Maggini Co., a corporation, defendant in the above-entitled action, and by its attorney and respectively shows:

That on, to wit, the 27th day of April, 1923, the Court in the above-entitled cause rendered its judgment in favor of the said plaintiff, Washington Dehydrated Food Co., a corporation, and against said defendant, Garcia & Maggini Co., a corporation, on, to wit, the 28th day of April, 1923, final judgment was made and entered in the above-entitled action in favor of the above plaintiff and against the said defendant; your petitioner feeling aggrieved with the said judgment, herewith petitions for an order to allow it to prosecute a writ of error to the United States Circuit Court of Appeals in and for the Ninth Circuit, under the laws of the United States in such cases made and provided;

WHEREFORE, the premises considered, your petitioner prays that a writ of error in its behalf to the United States Circuit Court of Appeals, Ninth Circuit, sitting in the city and county of San Francisco, State of California, in and for said Circuit, for the correction of errors committed by said Court at said trial and said judgment and in entering said judgment, for the reason set forth in petitioner's assignment of errors filed therein, and that a transcript of the record, proceedings and papers upon which said trial was had and judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

FRED L. DREHER,
Attorney for Petitioner.

[Endorsed]: Filed May 15, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [56]

(Title of Court and Cause.)

Assignment of Errors.

Now comes the defendant in the above-entitled cause and files the following assignment of errors upon which it will rely in the prosecution of its writ of error to review a final judgment made and entered against it on the 28th day of April, 1923, in the above-entitled action:

1.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff to show the market condition of dehydrated apples in the northwest and throughout the country on the 13th day of February, 1923, in the following instances:

Q. (By Mr. HAVEN.) What was the condition of the market in the northwest and throughout the country at the time of the date of this letter, February 13, 1920, and also on January 24, 1920, if there was any difference.

Mr. DREHER.—If the Court please, I object to the Question as immaterial, irrelevant and incompetent, and if there is any breach of a contract here the market price as of the date of the breach, the date of delivery, should cover, and not some time subsequent, which is February 13th.

Mr. HAVEN.—January 24th was the date of the first refusal.

The COURT.—It would be the price at or about that time. Of course the real price upon which the damage would be based would be the price that he received, assuming, of course, due diligence and good judgment in the sale. It would not be the exact price on the day of the breach. It depends, of course, upon what you call the day of the breach. He may answer the question; in so far as it is not material or competent, the Court will give it no consideration in making up its decision. For

the record, the objection will be overruled and an exception may be noted.

A. There was no such thing as a market at that time, in the [57] generally accepted use of that term in the trade. The market was dead.

2.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff to show and prove as a measure of proper damage the item of the expense for storage of the dehydrated apples, the subject matter of the contract, in the following instance:

Q. (By Mr. HAVEN.) Do you know whether or not you incurred storage charges: A. We did.

Mr. DREHER.—I object to that as immaterial, irrelevant and incompetent, because that would not be an item of damage.

The COURT.—As the Court stated heretofore, it will be admitted, and if not competent or material it will receive no consideration. The objection is overruled and an exception may be noted. The witness has answered the question.

Mr. DREHER.—At this time, in order to save time, possibly, may it be understood that my objection will run to all these questions with reference to the items of expense incurred by the plaintiff corporation.

3.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff

to show and prove as a measure of proper damage the item of interest charged by plaintiff to defendant, in the following instance:

Q. (By Mr. HAVEN.) In the invoice that you have in your hand, and which is referred to in this letter, you also included an item of interest: How do you compute that?

A. The interest on $11,400 for six months and eighteen days at eight per cent.

Q. That time ran from when?

A. That time ran from the time that the apples were definitely [58] tendered—whatever that letter shows, about the 1st of February, until we received the money for them from Libby, McNeill & Libby, on September 24th.

Q. That is when you received the money from the amount of the sale you made to Libby, McNeill & Libby? A. That is correct.

Q. How much was the interest that you figured in that manner? A. $501.60.

4.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff of evidence of the sale of some cars of dehydrated apples other than the specific car of apples contracted for by the plaintiff and the defendant and the subject matter of the suit between plaintiff and defendant, in the following instance:

Q. (By Mr. HAVEN.) You stated, Doctor, you were endeavoring to sell some cars of apples belonging to your company, as well as these covered by

this contract; when, if at all, did you sell these other cars?

A. The bulk of them were sold almost a year later.

Q. During the intervening time, what, if any, effort did you make to sell those apples?

Mr. DREHER.—That is objected to as immaterial, irrelevant and incompetent, and having no bearing on the issues in this case, and particularly having no bearing on the measure of damages.

The COURT.—What is the purpose of it?

Mr. HAVEN.—The purpose of it is to show good faith in making a sale of the other apples first, and that we made a continuous attempt to sell these apples.

The COURT.—The objection is overruled.

Mr. DREHER.—Exception.

A. We made constant and vigorous efforts to sell them. [59]

5.

The District Court erred in admitting evidence, over the objection of defendant, and in not sustaining defendant's objection to the offer of plaintiff of evidence of the price realized by the plaintiff upon the sale of some cars of apples other than the specific cars of apples contracted for by the plaintiff and defendant, the subject matter of the suit between plaintiff and defendant, in the following instance:

Mr. HAVEN.—Q. And you sold the others just as soon as you could, after having sold the apples under this contract, did you? A. Yes, sir.

Q. At what price did you sell them?

Mr. DREHER.—I object to the question as immaterial, irrelevant and incompetent, and having no bearing on the issue of damages.

The COURT.—I rather think so; still, he has advanced a theory that seems almost impossible on its face, yet I will allow the answer to go in; if not material, the Court will give it no consideration.

A. The Extra Choice grades, which was the same as those tendered, netted us slightly in excess of 5 cents per pound.

6.

The District Court erred in holding and deciding that the measure of damages to be awarded to the plaintiff was the difference between the contract price of the dehydrated apples and the price realized upon the resale thereof and in awarding a judgment based upon such difference.

7.

The District Court erred in weighing and considering evidence and making a finding of fact that "On or about January 17, 1920, plaintiff duly tendered to the defendant the delivery of the apples described in the aforesaid contract, and thereupon advised defendant that plaintiff was ready, willing and able to deliver said evaporated apples, in accordance with the [60] terms of said contract, and demanded that defendant forthwith furnish plaintiff with shipping instructions for the shipment of said evaporated apples, as provided in said contract."

8.

The District Court erred in weighing and considering evidence and making a finding of fact that "Defendant failed and refused to furnish plaintiff with said or any shipping instructions, and on or about January 23, 1920, notified plaintiff that it, the said defendant, would not perform the terms of the aforesaid contract, and has continuously failed and refused to perform the same."

9.

The District Court erred in weighing and considering evidence and making a finding of fact that "On July 30, 1920, plaintiff sold said evaporated apples which were described in said contract, at a price of eleven and three-fourths (11¾) cents per pound, or a total sum of seventy hundred fifty ($7050.00) dollars. Said sale was made within a reasonable time after the refusal of defendant to accept the delivery of said apples, and with due diligence and in good faith, and as soon as reasonably practicable, by a diligent, competent and prudent salesman, inspired by honesty of purpose and fair consideration for the defendant as well as for the plaintiff."

10.

The District Court erred in weighing and considering evidence and making a finding of fact that "Subsequent to the demand by plaintiff of defendant for the performance of the terms of said contract, and prior to the sale of said evaporated apples by it, plaintiff segregated the apples covered by said contract in a warehouse, and paid storage

upon the same in the sum of three *hundred,* which expense was necessarily incurred by plaintiff in caring for said apples during said period."

11.

The District Court erred in weighing and considering evidence and making a finding of fact that "The aforesaid [61] contract of June 13, 1919, was never rescinded or cancelled by the defendant, and the plaintiff never accepted or consented to such rescission or cancellation, and the obligations on the part of the defendant therein contained never were extinguished."

12.

The District Court erred in not holding and deciding and making a finding of fact that the contract sued upon was cancelled by agreement of the plaintiff and the defendant on or about the 23d day of January, 1920.

13.

The District Court erred in not holding and deciding and making a finding of fact that the contract sued upon was breached by the defendant on January 23d, 1920, and that on said last mentioned date the said breach was accepted and acted upon by the plaintiff.

14.

The District Court erred in not holding and deciding and making a finding of fact that the market price for dehydrated apples of the kind and quality contracted for on January 23d, 1923, and for a reasonable time thereafter f. o. b. Pacific Coast Rail Shipping point was between seventeen cents and nineteen cents a pound.

15.

The District Court erred in not holding and deciding and making a finding of fact that there was an active buying market for dehydrated apples of the type, quality and quantity contracted for, during the months of January, February and March, 1920, and that during the said last above-mentioned months the market price for said apples at Pacific Coast Rail Shipping point was as follows:

During January, 1920, seventeen to nineteen cents per pounds:

During February, 1920, sixteen to eighteen cents per pound;

During March, 1920, fourteen cents per pound.

16.

That the judgment of the District Court is not warranted [62] nor supported by the fact, or the law in the premises, but is contrary thereto.

WHEREFORE the appellant prays that the judgment of the United States District Court in and for the Northern District of California, made and entered herein in the office of the Clerk of said Court on the 28th day of April, 1923, be reversed.

Dated: San Francisco, California, this 15th day of May, 1923.

FRED L. DREHER,
Attorney for Defendant and Appellant.

[Endorsed]: Filed May 15, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [63]

(Title of Court and Cause.)

Order Allowing Writ of Error and Fixing Bond.

Upon reading and filing the petition for writ of error of the said defendant in the above-entitled cause, as likewise the prayer for reversal of the judgment heretofore entered,—

IT IS ORDERED that said writ of error be and it is hereby allowed and the bond is fixed at the sum of Three Hundred ($300.00) Dollars.

Dated: May 15th, 1923.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed May 15, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [64]

(Title of Court and Cause.)

Order for Supersedeas Bond.

IT APPEARING TO THE COURT that the defendant in the above-entitled cause has duly and regularly filed its petition for a writ of error to reverse the judgment of said Court in said action, together with its assignment of errors and a prayer for reversal, and all and singular the premises having been considered,—

IT IS ORDERED that said judgment be, and it is hereby, suspended and superseded upon the execution by said defendant of an undertaking to be approved by me, a Judge of said Court, with two

sufficient sureties, in accordance with Rules 70 and 71 of this Court, in the sum of Six Thousand ($6,000.00) Dollars.

Dated: May 15th, 1923.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed May 15, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [65]

(Bond on Writ of Error.)

KNOW ALL MEN BY THESE PRESENTS, That we, Garcia & Maggini Co., a corporation, as principal and New Amsterdam Causalty Company, a body corporate duly incorporated under the laws of the State of New York, and authorized to act as surety under the act of Congress approved August 13, 1894, whose principal office is located in Baltimore, State of Maryland, as sureties, are held and firmly bound unto Washington Dehydrated Food Co., a corporation, in the full and just sum of Six Thousand and no/100's ($6,000.00) Dollars, to be paid to the said Washington Dehydrated Food Co., a corporation—certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this tenth day of May in the year of our Lord one thousand nine hundred and twenty-three.

WHEREAS, lately at a District Court of the United States for the Northern District of California in a suit depending in said Court, between Washington Dehydrated Food Co., a corporation, plaintiff, and Garcia & Maggini Co., a corporation, defendant, a judgment was rendered against the said Garcia & Maggini Co., a corporation, and the said Garcia & Maggini Co., a corporation, having obtained from said Court a writ of error, allowing an appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said Washington Dehydrated Food Co., a corporation, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Garcia & Maggini Co., a corporation, shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written. [66]

NEW AMSTERDAM CASUALTY COMPANY.

[Seal] By WALTER W. DERR,

Agent and Attorney in Fact. [Seal]

Form of bond and sufficiency of sureties approved.

JOHN S. PARTRIDGE,

Judge.

[Endorsed]: Filed May 15, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [67]

(Title of Court and Cause.)

(Bond for Costs.)

WHEREAS, in an action in the District Court of the United States in and for the Northern District of California, Southern Division, a judgment was on the twenty-eighth day of April, 1923, rendered in favor of the above-named plaintiff and against the above-named defendant in said cause;

AND WHEREAS, the said defendant is dissatisfied with said judgment and is desirous of reversing the same, and to that end has sued out and been allowed a writ of error addressed to said above-entitled court, for the purpose of reviewing and reversing the said judgment,—

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES and of such writ of error, the undersigned New Amsterdam Casualty Company, a corporation organized and existing under the laws of the State of New York, is held and firmly bound and does hereby undertake in the sum of Three Hundred Dollars ($300.00), and promise on behalf of the defendant in the above-entitled cause that said defendant will pay all damages and costs which may be awarded against it on said writ of error, or the affirmance of said judment, or on a dismissal of said writ of error, not exceeding the aforesaid sum of

Three Hundred Dollars ($300.00), to which amount it acknowledges itself bound.

AND THE SAID SURETY does further agree that in the event of a breach of any condition hereof, and if the said defendant herein shall not successfully prosecute its writ of error, or if the same is dismissed, then the above-entitled court may, upon notice to the said surety, of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which the said surety is bound to pay on account of said breach, not exceeding the sum of Three Hundred Dollars ($300.00) and render judgment therefor against it, not exceeding [68] the sum of Three Hundred Dollars ($300.00), and award execution therefor.

Dated at San Francisco, California, this sixteenth day of May, A. D. 1923.

NEW AMSTERDAM CASUALTY COMPANY, (Seal)
By WALTER W. DERR,
Agent and Attorney in Fact.

[Endorsed]: Filed May 16, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

(Title of Court and Cause.)

Praecipe for Transcript of Record.

To the Clerk of Said Court:

Sir: Please prepare record on writ of error and include the following:

1. Judgment-roll.
2. Bill of exceptions.
3. Petition for allowance of writ of error.
4. Assignment of errors.
5. Order allowing writ of error, etc.
6. Appeal bond.
7. Order for supersedeas.
8. Supersedeas bond.
9. Praecipe for record.
10. Original writ of error and citation on writ of error.

FRED L. DREHER,
Attorney for Defendant.

[Endorsed]: Filed Jul. 3, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing seventy (70) pages, numbered from 1 to 70, inclusive, to be

full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the Clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $33.95; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 11th day of July, A. D. 1923.

[Seal] WALTER B. MALING,

Clerk United States District Court for the Northern District of California. [71]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Garcia & Maggini Co., a Corporation, plaintiff in error, and Washington Dehydrated Food Co., a Corporation, defendant in er-

ror, a manifest error hath happened, to the great damage of the said Garcia & Maggini Co., a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 15th day of May, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal] WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

JOHN S. PARTRIDGE,
U. S. District Judge. [72]

Due service and receipt of a copy of the within writ of error is hereby admitted this 16th day of May, 1923.

HAVEN, ATHEARN, CHANDLER & FARMER,
Attorneys for Defendant in Error.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

WALTER B. MALING,
Clerk U. S. District Court for the Northern District of California.

[Endorsed]: No. 16,703. United States District Court for the Northern District of California. Garcia & Maggini Co., a Corporation, Plaintiff in Error, vs. Washington Dehydrated Food Co., a Corporation, Defendant in Error. Writ of Error. Filed May 16, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Washington Dehydrated Food Co., a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Garcia & Maggini Co., a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 15th day of May, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge. [73]

Due service and receipt of a copy of the within citation on writ of error is hereby admitted this 16th day of May, 1923.

HAVEN, ATHEARN, CHANDLER & FARMER,
Attorneys for Defendant in Error.

[Endorsed]: No. 16,703. United States District Court for the Northern District of California. Garcia & Maggini Co., Plaintiff in Error, vs. Washington Dehydrated Food Co., a Corp., Defendant in Error. Citation on Writ of Error. Filed May 16, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 4055. United States Circuit Court of Appeals for the Ninth Circuit. Garcia & Maggini Company, a Corporation, Plaintiff in Error, vs. Washington Dehydrated Food Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed July 11, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

GARCIA & MAGGINI CO., a Corporation,
Plaintiff in Error,

vs.

WASHINGTON DEHYDRATED FOOD CO., a Corporation,
Defendant in Error.

Order Extending Time to and Including July 14, 1923, to File Record on Writ of Error and to Docket Cause.

Good cause being shown, IT IS HEREBY ORDERED that the plaintiff in error in the above-entitled cause may have to and including July 14, 1923, within which to file the record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: June 14, 1923.

HUNT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 4055. United States Circuit Court of Appeals for the Ninth Circuit. Garcia & Maggini Co., a Corp., Plaintiff in Error, vs. Washington Dehydrated Food Co., a Corporation, Defendant in Error. Order Extending Time to and Including July 14, 1923, to File Record on Writ of Error and to Docket Cause. Filed Jun. 14, 1923. F. D. Monckton, Clerk.